



STATE OF WISCONSIN Division of Hearings and Appeals

In the Matter of

Office of the Inspector General, Petitioner

vs.

██████████, Respondent

DECISION

Case #: FOF - 174530

Pursuant to petition filed May 20, 2016, under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the Office of the Inspector General to disqualify ██████████ from receiving FoodShare benefits (FS) one year, a hearing was held on Thursday, July 7, 2016 at 10:15 AM at , Wisconsin.

The issue for determination is whether the respondent committed an Intentional Program Violation (IPV).

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

Office of the Inspector General
Department of Health Services - OIG
PO Box 309
Madison, WI 53701

By: ██████████, PARIS Agent

Respondent:

██████████
██████████
██████████

█

ADMINISTRATIVE LAW JUDGE:

Mayumi M. Ishii
Division of Hearings and Appeals

FINDINGS OF FACT

1. On August 20 2014, an individual named ██████████ completed a SNAP 6 month review in Kentucky. He included the Respondent in his household. (Exhibit 12)
2. It appears that ██████████ received benefits in Kentucky for the months of May 2014 through September 2014, but the date he received the September allotment is unknown. (Exhibit 10)

3. On September 30, 2014, the Respondent completed a phone healthcare renewal. She also reapplied for FoodShare benefits. The agency obtained a telephonic signature. (Exhibit 7)
4. The agency completed an application summary, which indicates the Respondent reported living in Milwaukee and that she understood the penalties for giving false information or breaking the rules. (Exhibit 4)
5. The Petitioner received benefits on September 30, 2014. She did not receive benefits again, until January 2016. Prior to September 2014, she last received benefits in Wisconsin on June 6, 2014. (Exhibit 5)
6. In October 2014, the agency received returned mail on two occasions and it updated the Respondent's address with a Kentucky address. (Exhibit 7)
7. In November 2014, the agency spoke to the Respondent and questioned her residency, but she denied living in Kentucky. (Exhibit 7)
8. On June 1, 2016, the Office of Inspector General (OIG) prepared an Administrative Disqualification Hearing Notice alleging that the Respondent provided false information between September 30, 2014, and October 31, 2014, in order to receive benefit to which she was not entitled. (Exhibit 1)

DISCUSSION

Respondent's Non-appearance

The Respondent did not appear for this hearing. This circumstance is governed by the regulation in 7 C.F.R. §273.16(e)(4), which states in part:

If the household member or its representative cannot be located or fails to appear at a hearing initiated by the State agency without good cause, the hearing shall be conducted without the household member being represented. ***Even though the household member is not represented, the hearing official is required to carefully consider the evidence and determine if intentional Program violation was committed based on clear and convincing evidence.*** If the household member is found to have committed an intentional program violation but a hearing official later determines that the household member or representative had good cause for not appearing, the previous decision shall no longer remain valid and the State agency shall conduct a new hearing. The hearing official who originally ruled on the case may conduct a new hearing. In instances where the good cause for failure to appear is based upon a showing of nonreceipt of the hearing notice, the household member has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. In all other instances, *the household member has 10 days from the date of the scheduled hearing to present reasons indicating a good cause for failure to appear. A hearing official must enter the good cause decision into the record.*

Emphasis added

The hearing in this case took place on July 7, 2016. The Respondent was advised of the date and time of the hearing, in an Administrative Disqualification Hearing Notice that was sent to her at an address in South Milwaukee.

██████████ indicated that the address used was the last address the Respondent reported. Case Comments indicate the Respondent had contact with the county agency as recently as May 19, 2016. ██████████ indicated that there was no returned mail.

The notice advised the Respondent to call with a phone number where she could be reached for the hearing. The Respondent did not call in with a number. An attempt was made to contact the Respondent at (414) [REDACTED], but there was only a busy signal. So, the hearing proceeded in her absence. The Respondent did not contact the Division of Hearings and Appeals within 10 days to explain her failure to appear. As such, it is found that the Respondent did not have good cause for her non-appearance.

What is an Intentional Program Violation?

7 C.F.R. §273.16(c) states that Intentional Program Violations “shall consist of having intentionally: 1) Made a false or misleading statement or misrepresented facts; or 2) Committed an act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any State statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of coupons, authorization card or any other reusable documents used as part of an automated delivery system (access device).”

The Department’s written policy restates federal law, below:

3.14.1 IPV Disqualification

7 CFR 273.16

A person commits an Intentional Program Violation (IPV) when s/he intentionally:

1. makes a false or misleading statement, or misrepresents, conceals or withholds facts; or
2. commits any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any Wisconsin statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of FoodShare benefits or QUEST cards.

An IPV may be determined by the following means:

1. Federal, state, or local court order,
2. Administrative Disqualification Hearing (ADH) decision,
3. Pre-charge or pretrial diversion agreement initiated by a local district attorney and signed by the FoodShare recipient in accordance with federal requirements, or
4. Waiver of the right to an ADH signed by the FoodShare recipient in accordance with federal requirements.

FoodShare Wisconsin Handbook, §3.14.1.

The agency may disqualify only the individual who either has been found to have committed the IPV or has signed a waiver or consent agreement, and not the entire household. If disqualified, an individual will be ineligible to participate in the FS program for one year for the first violation, two years for the second violation, and permanently for the third violation. However, any remaining household members must agree to make restitution within 30 days of the date of mailing a written demand letter, or their monthly allotment will be reduced. 7 C.F.R. §273.16(b).

What is OIG’s burden of Proof?

In order for the agency to establish that a FoodShare recipient has committed an IPV, it has the burden to prove two separate elements by clear and convincing evidence. The recipient must have: 1) committed; and 2) intended to commit an intentional program violation per 7 C.F.R. §273.16(e)(6).

"Clear and convincing evidence" is an intermediate standard of proof which is more than the "preponderance of the evidence"(a.k.a. “more likely than not”) used in most civil cases and less than the "beyond a reasonable doubt" standard used in criminal cases.

In Kuehn v. Kuehn, 11 Wis.2d 15, 26 (1959), the court held that:

Defined in terms of quantity of proof, reasonable certitude or reasonable certainty in ordinary civil cases may be attained by or be based on a mere or fair preponderance of the evidence. Such certainty need not necessarily exclude the probability that the contrary conclusion may be true. In fraud cases it has been stated the preponderance of the evidence should be clear and satisfactory to indicate or sustain a greater degree of certitude. Such degree of certitude has also been defined as being produced by clear, satisfactory, and convincing evidence. Such evidence, however, need not eliminate a reasonable doubt that the alternative or opposite conclusion may be true. In criminal cases, while not normally stated in terms of preponderance, the necessary certitude is universally stated as being beyond a reasonable doubt.

Wisconsin Jury Instruction – Civil 205 is also instructive. It provides:

Clear, satisfactory and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that “yes” should be the answer because of its greater weight and clear convincing power. “Reasonable certainty” means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. This burden of proof is known as the “middle burden.” The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence but may be less than beyond a reasonable doubt.

Further, the *McCormick* treatise states that “it has been persuasively suggested that [the clear and convincing evidence standard of proof] could be more simply and intelligibly translated to the jury if they were instructed that they must be persuaded that the truth of the contention is highly probable.” 2 *McCormick on Evidence* § 340 (John W. Strong gen. ed., 4th ed. 1992).

Thus, in order to find that an IPV was committed, the trier of fact must derive from the evidence, a firm conviction as to the existence of each of the two elements even though there may be a reasonable doubt that the elements have been shown.

The Merits of OIG’s Case

In the case at hand, the Office of the Inspector General (OIG) asserts that the Respondent violated the rules of the FoodShare Program by lying about being a Wisconsin resident between September 30, 2014 and October 31, 2014.

“A household shall live in the State in which it files an application for participation” in the food stamp program. 7 *CFR* §273.3(a)

In order to prevail in a case such as this, OIG must provide:

1. The applications from just before the IPV was committed and from the period in question to show that the Respondent received warnings about the penalties for providing false information and to show what the Respondent reported to the agency;
2. Page 2 of the Eligibility and Benefits Booklet, along with the CARES Correspondence History Search Result, also provides evidence that the Respondent was warned about the penalties for providing false information or breaking the rules.
3. Six month report forms during the time in question, to prove what the Respondent reported to the agency;

4. The case comments for the time in question to show what the Respondent reported to the agency;
5. Reliable documentation from the period in question and/or testimony from individuals with knowledge of the Respondent's living situation, to prove the Respondent was living outside Wisconsin.
6. When EBT usage is relied upon, it must include the EBT card number used, the date of transaction, the merchant FNS number, the location of the merchant and a print off showing that the EBT cards in the report were actually issued to the Respondent.

In order to prove the Respondent was actually in Kentucky at the time she completed her September 30, 2014 application in Wisconsin, the agency relied upon a printout entitled "FS Report #25 – FS Transactions for Given Case or Card Number (Exhibit 6) The agency asserts that this shows the Respondent's EBT usage was exclusively in Kentucky during September 2014. However, the agency has provided no documentation to connect the EBT card listed in that report with the Respondent. As such, Exhibit 6 is insufficient to prove the Respondent used her benefits exclusively in Kentucky and was therefore, living there.

According to a May 19, 2016 Case Comment entered by an individual whose name is not even known, the Respondent reported moving to Milwaukee from Kentucky "Four months ago" when her husband [REDACTED] became incarcerated. However, this does not establish that the Respondent was living in Kentucky at the time of her September 2014 application for benefits in Wisconsin, since the case comment does not establish how long she was in Kentucky, before moving to Milwaukee. This is important, because it is undisputed that the Respondent was in Wisconsin, at least as of January 2014. (See Exhibit 3)

OIG also relied upon documentation of [REDACTED]'s FoodShare case in Kentucky that ended in September 2014. However, this does not prove the Respondent was living in Kentucky at the time of her September 2014 application. Indeed, there is no evidence that the Respondent even knew she was on [REDACTED]'s case. Further, it is entirely possible that the Respondent moved back to Wisconsin in September 2014 and was truthful in her application.

There is a case comment indicating that on October 16, 2014, the agency received returned mail and an updated a forwarding address, but the case comment does not state what that address was and OIG did not produce a copy of the returned envelope as an exhibit. So, it is unclear what the forwarding address was.

An October 30, 2014 entry indicates that the Respondent did not provide employment verification and, "updated address is for another state." There is also a case comment dated November 12, 2014, indicating that the agency "moved return mail docs received on 11/06/14 to ECF. New Kentucky address was already updated." However, the agency did not provide copies of that returned envelope, either.

Without the envelopes from the returned mail, there is no way to know whether the documents were mailed to the correct address, before being returned. In addition, it would have been interesting to see if the returned mail envelopes, to see if the forwarding address matched the address [REDACTED] provided on his Kentucky six month review. Though I would note that the post office generally forwards mail for up to one year.

It should also be noted that there is a case comment dated November 21, 2014, that indicates the Respondent called the agency to check on her case and that she denied living in Kentucky.

Looking at the evidence as a whole, OIG was correct to be suspicious of the Respondent's statements. However, suspicion is not the same as clear and convincing evidence. OIG's case falls short because it did not provide any documentation establishing that the EBT card listed in Exhibit 6 was issued to the Respondent and because it failed to provide copies of the envelopes from the returned mail.

CONCLUSIONS OF LAW

OIG has not met its burden to prove the Respondent committed an IPV between September 30, 2014 and October 31, 2014.

NOW, THEREFORE, it is ORDERED

That IPV case number [REDACTED] is hereby reversed.

REQUEST FOR A REHEARING ON GROUNDS OF GOOD CAUSE FOR FAILURE TO APPEAR

In instances where the good cause for failure to appear is based upon a showing of non-receipt of the hearing notice, the respondent has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. See 7 C.F.R. sec. 273.16(e)(4). Such a claim should be made in writing to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

APPEAL TO COURT

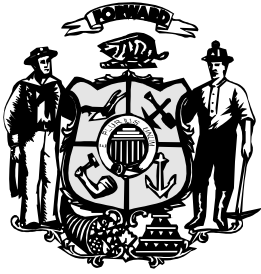
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI 53703, **and** on those identified in this decision as “PARTIES IN INTEREST” **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing request (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Milwaukee,
Wisconsin, this 22nd day of July, 2016

\sMayumi M. Ishii
Administrative Law Judge
Division of Hearings and Appeals

c: Office of the Inspector General - email
Public Assistance Collection Unit - email
Division of Health Care Access and Accountability - email
[REDACTED] - email



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on July 22, 2016.

Office of the Inspector General
Public Assistance Collection Unit
Division of Health Care Access and Accountability
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